Supreme Court, U.S.
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No. 04-603

IN THE

Supreme Court of the United States

GRABLE & SONS METAL PRODUCTS, INC.,
A Michigan corporation,

Petitioner,

v.

DARUE ENGINEERING & MANUFACTURING,
A Michigan corporation

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1 THE DISTRICT COURT HAD SUBJECT MATTER JURISDICTION TO DECIDE THIS CASE

A district court has original jurisdiction over civil actions pursuant to, *inter alia,* 28 U.S.C. §§ 1441 and 1331 (2004). This Court has long held that a district court has subject matter jurisdiction over a case if the plaintiff's complaint establishes that plaintiff's right to relief under a state law requires resolution of a substantial question of federal law in dispute between the parties.

In this case, Petitioner affirmatively alleged in its Complaint that Respondent's deed to a particular piece of property was invalid because Petitioner was given improper notice of the property's seizure pursuant to a federal statute, I.R.C. § 6335 (2004).

The question presented is when a plaintiff files a claim under state law but a substantial federal question regarding a federal statute is explicitly pleaded in the plaintiff's complaint and the federal statute must first be analyzed and resolved before any attempt to address plaintiff's claim can be made, does a defendant have the right to remove such a cause of action to district court?

2 SUBSTANTIAL COMPLIANCE WITH I.R.C. § 6335 IS SUFFICIENT WHERE THE TAXPAYER RECEIVED ACTUAL NOTICE.

There is no split in the circuits regarding strict versus substantial compliance under I.R.C. § 6335. I.R.C. § 6335 concerns the Internal Revenue Service's right to seize property from taxpayers who fail to pay their taxes. Courts have held strict compliance is necessary under I.R.C. § 6335 when a taxpayer does not receive any notice of the seizure or attempts to rectify the seizure before the sale of the property to an innocent third party. Courts have also held that substantial compliance is sufficient under I.R.C. § 6335 – and its counterpart, I.R.C. § 6339 (2004) – when actual notice has been received by the taxpayer but the taxpayer fails to assert any rights until after the sale is completed.

The question presented is when a taxpayer receives actual notice of a seizure of property by the United States for its failure to pay taxes but the taxpayer fails to exercise its rights until six years after the property is sold to an innocent third party. did the United States comply with I.R.C. §§ 6335 and 6339?

PARTIES TO THE PROCEEDING AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Darue Engineering & Manufacturing states as follows:

1. All interested parties to this proceeding are identified in the caption.

2. There is no parent or publicly held company owning 10% or more of Darue Engineering & Manufacturing stock.

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APPENDIX 1 – Transcript and Oral Opinion of the United States District Court for the Western District of Michigan, Southern Division, Dated and Filed: April 2, 2001.

APPENDIX 2 – Complaint to Quiet Title (without exhibits), filed in the Circuit Court for the County of Eaton, State of Michigan, Dated and Filed: December 14, 2000.

Pursuant to Rule 15, Respondent is charged with highlighting to this Court any misstatement of fact or law in the Petition for Writ of Certiorari regarding any issues that would be before the Court if certiorari were granted. While it is true that the facts are undisputed in this case, Petitioner – as it has previously done in the lower courts – has omitted key undisputed facts and/or opinions on both issues in its Petition. For the reasons detailed below, Respondent respectfully requests Petitioner's Petition for Writ of Certiorari be denied.

CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS BELOW

As Petitioner did with its Sixth Circuit filings, Petitioner failed to attach a critical opinion from the United States District Court for the Western District of Michigan, Southern Division, denying Petitioner's Motion for Remand. The Opinion discussed, in detail, well established principles from the Sixth Circuit and the United States Supreme Court regarding the jurisdictional issue in this case. The transcript from the District Court's denial of Petitioner's motion to remand this case on April 2, 2001, is attached and incorporated as Respondent's Appendix 1. Respondent otherwise concurs in Petitioner's Citations of Official and Unofficial reports of the Opinions Below.

STATEMENT OF JURISDICTION

Respondent concurs in Petitioner's Statement of Jurisdiction.

STATUTORY PROVISIONS AT ISSUE

The relevant portions of 28 U.S.C. §§ 1331, 1340, 1346, 1441, 2410 and 26 U.S.C. §§ 6335 and 6339.

STATEMENT OF THE CASE

A. Factual History.

Prior to 1994, Petitioner, Grable & Sons Metal Products, Inc. ("Grable"), failed to pay its corporate taxes to the Internal Revenue Service ("IRS") for at least six years.[1] As a result, the IRS recorded tax liens against Grable's Property. The IRS then attempted to personally serve Grable a notice of seizure on the Property ("Notice of Seizure") because of the tax deficiency.[2] Unable to personally serve Grable, the IRS sent the Notice of Seizure by certified mail. Although Grable fails to mention this pivotal fact in its Petition, Grable has previously admitted to receiving the certified mailing of the Notice of Seizure and, thus, had actual knowledge that the IRS was seizing its Property.[3] Grable also failed to mention that despite receiving actual notice, Grable took no legal action to stop the seizure or subsequent sale.

Thereafter, the IRS personally served Grable a Notice of the Sale of its Property ("Notice of Sale"), advertised the sale in the local newspaper, and posted the Notice of Sale at a local post office, courthouse, and IRS office. Grable, again, failed to take legal action.

On November 22, 1994, the IRS sold the Property in a tax sale to Respondent, Darue Engineering and Manufacturing ("Darue"). Grable, once again, did nothing to redeem the Property. After the sale and after the time for Grable to redeem the Property was complete, the IRS granted all rights, title and interest in the Property to Darue. Next, the IRS filed suit against Grable for the outstanding tax debt that remained after the sale of the Property. As with every other opportunity Grable had to recover the Property or to complain about defective service, however, Grable did nothing. Consequently, the District Court entered a default judgment in favor of the IRS and against Grable reducing the tax liabilities to judgment.

B. Procedural History.

Although the controversy in this case is really between Grable and the IRS, Grable elected to sue Darue to avoid the federal courts. On December 14, 2000—six years after the sale and on the eve of the statute of limitations running (another key fact Grable failed to mention in its Petition)—Grable sought equitable relief in a quiet title

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[1] The Grable family has a long and interesting history with the Federal Government. United States District Court Judge Gordon A. Quist held several hearings to determine whether the IRS could enter and seize property owned by Grable, including the real property at issue in this matter. Judge Quist ultimately determined that the United States could. In an effort to defeat Judge Quist's order, Grable filed a bankruptcy action in the United States Bankruptcy Court for the Western District of Michigan. That matter was dismissed as a bad faith filing by Judge James D. Gregg. The property was seized and sold in 1995. Thereafter, Grable filed three different appeals to the Sixth Circuit regarding issues related to this case. In all instances, the Sixth Circuit affirmed the District Court's denial of Grable's arguments. *See Internal Revenue Service v. Grable & Sons Metal Products, Inc.*, No. 94-2426, 81 F.3d 160 (Table), 1996 WL 140352 (6th Cir. Mar. 27, 1996); *Grable & Sons Metal Products v. Twitchell*, No. 94-2461, 69 F.3d 537 (Table), 1995 WL 631566 (6th Cir. Oct. 26, 1995); *Grable & Sons Metal Products v. U.S.*, No. 94-1989, 59 F.3d 170 (Table), 1995 WL 367099 (6th Cir. Jun. 19, 1995).

[2] During the Rule 16 Scheduling Conference, the Tax Division Attorney stated that an agent went to Grable's home to personally serve him the notice of seizure on his property but was unable to serve Grable. Thereafter, the agent sent the notice by certified mail. There was also considerable testimony in the hearing before Judge Quist on the United States Marshal's attempts to serve Grable with an order for entry to seize assets. The Grables routinely refused to answer the door and even closed a window on one of the Marshal's hands.

[3] During the Rule 16 Scheduling Conference, Grable's attorney also conceded that Grable received the Notice of Seizure via certified mail.

lawsuit against Darue in state court based on I.R.C. § 6335. The Complaint alleged that Grable remained the owner of its Property despite its repeated failure to pay taxes because the IRS did not comply with I.R.C. § 6335.

On January 16, 2001, Darue filed its Notice of Removal of Action to the District Court based on 28 U.S.C. § 1441. Grable responded on January 31, 2001, by filing a Motion to Remand the Case. On February 13, 2001, Darue filed its Response to Grable's Motion to Remand. Thereafter, on April 2, 2001, United States District Judge David W. McKeague conducted a hearing and, after a detailed analysis of Sixth Circuit and United States Supreme Court decisions, the District Court held that it had proper jurisdiction to hear the case because "the question of federal law raised in this complaint, i.e., the application of I.R.C. § 6335(a), is in fact a 'substantial question' of federal law."[4]

On April 13, 2001, Darue interpleaded the United States into the case because the critical issue in determining the case pertained to the actions of the IRS. On March 22, 2002, the final opinion from the District Court dismissing the entire case was entered. The opinion granted Darue summary judgment because the IRS complied with I.R.C. § 6335, and thus, Darue had proper title to the Property. Grable appealed to the Sixth Circuit Court of Appeals, which affirmed the District Court's opinion that the District Court had jurisdiction to hear this case, by ultimately holding that Grable's claim implicated a substantial federal interest, and thus presented a federal question. The Sixth Circuit also affirmed the District Court's opinion that granted Darue summary judgment because I.R.C. § 6335 was complied with by the IRS when seizing Grable's Property.

[4] Transcript of District Court Hearing on Petitioner's Motion to Remand on April 2, 2001, at 17; attached as Respondent's Appendix 1.

FIRST QUESTION PRESENTED: THE DISTRICT COURT HAD SUBJECT MATTER JURISDICTION TO DECIDE THIS CASE

This case involves a well-known tax protestor who is attempting to play "cute" with the judicial system in an effort to continue to avoid paying taxes that are long overdue.[5] Grable has gone through great pains to disguise its claim in an attempt to avoid having this case decided by the federal courts. A cursory review of the complaint and controlling case law regarding subject matter jurisdiction, however, reveals that no matter how Grable has masked its Complaint, the sole issue that is in dispute and must be decided in this case turns on two federal statutes.

A. Reasons for Denying Writ

The Petition for Writ of Certiorari should be denied for three reasons. First, the District Court was correct in holding that it had original jurisdiction over this case. Grable's action may be guised under state law, but a substantial federal question concerning I.R.C. §§ 6335 and 6339 is the sole issue that decides this case.

Second, the jurisdiction issue is moot. By the time the final order dismissing the case was entered, which is the order being appealed, the United States was a party in the case. Thus, under 28 U.S.C. § 1346, the District Court also had original subject matter jurisdiction over this case.

Third, the Sixth Circuit was correct in its holding that the District Court had original jurisdiction. The Sixth Circuit relied upon and analyzed well-established principles regarding jurisdiction that have been affirmed by this Court.

[5] Grable owes the United States well over $2 million dollars as a result of its failure to pay delinquent taxes owed. *See* Appendix C.

B. The District Court Was Correct In Holding It Had Original Jurisdiction To Decide This Case.

1. Any State Law Contained in Grable's Complaint Requires the Resolution of a Substantial Question of Federal Law.

A defendant has the right to remove to a federal district court "any civil action brought in a state court of which the district courts of the United States have original jurisdiction."[6] District courts have original jurisdiction under 28 U.S.C. § 1441 over cases "arising under the Constitution, laws, or treatises of the United States."[7] It is well-settled law that a cause of action arises under federal law when a plaintiff's well-pleaded complaint raises issues of federal law.[8] Specifically, even though state law may create a cause of action in a complaint, a case may still "arise under" the laws of the United States if the well-pleaded complaint established that plaintiff's right to relief under the state law required resolution of a substantial question of federal law in dispute between the parties.[9]

In this case, the District Court had original jurisdiction under 28 U.S.C. § 1331. Assuming, *arguendo*, that state law created Grable's cause of action, Grable's case still arose under the laws of the United States because its Complaint established that Grable's right to relief under state law required the resolution of a substantial question of

[6] 28 U.S.C. § 1441(a).

[7] 28 U.S.C. § 1331.

[8] *See City of Chicago v. International College of Surgeons*, 522 U.S. 156, 163 (1997) (quoting *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 61 (1987)).

[9] *See Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983).

federal law, namely the notice required by I.R.C. § 6335, which was in dispute between the parties. According to this Court's decisions, this is sufficient to establish federal question jurisdiction in a district court.[10]

When looking at Grable's Complaint, particularly paragraphs 10 and 11, the entire foundation of Grable's claim is based on whether the IRS failed to strictly comply with the notice requirements of federal law when the IRS took title to the Property and then conveyed it in a tax sale to Darue. In other words, Petitioner's right and remedy will rise or fall based on an interpretation of federal law, not state law. Specifically, the Complaint states:

> 10. That the claim of the Defendant is invalid because the interest from which it claims, to-wit the Deed, attached as Exhibit 2, was given with improper notice pursuant to 26 USC 6331, et. seq.
>
> That Grable was not served pursuant to said requirements in that it was not given to it or was not left at the usual place of abode or business that existed within the Internal Revenue District where the seizure was made.
>
> 11. That since the tax deed was given pursuant to improper notice as required by 26 USC 6335(a), said transfer and claim through the tax deed is null and void and void ab initio.[11]

[10] *See, e.g., City of Chicago*, 522 U.S. 156; *Franchise Tax Bd.*, 463 U.S. 1; and *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921).

[11] Complaint to Quiet Title, filed in Circuit Court for the County of Eaton, State of Michigan, dated December 14, 2000; Appendix 2.

Thus, the District Court was left with a Complaint that, on its face, required a determination of the construction of federal law to resolve what was framed as a state law question.

In deciding the jurisdictional issue, the District Court acknowledged that Darue bore the burden of establishing jurisdiction and began its analysis with this Court's holding in *Franchise Tax Bd.* The District Court recognized that *Franchise Tax Bd.* gave specific guidance regarding federal court jurisdiction. That guidance provides that an action is deemed to arise under federal law if (1) the federal law created the cause of action or (2) vindication of a state law right necessarily turned on the construction of federal law.[12]

This Court's decision in *City of Chicago* was also examined by the District Court. *City of Chicago* similarly held that a case may arise under the laws of the United States if it requires resolution of a substantial question of federal law even if state law creates the plaintiff's cause of action:

> As we have explained, however, '[e]ven though state law creates [a party's] causes of action, its case might still 'arise under' the laws of the United States if a well-pleaded complaint established that its right to relief under state law requires resolution of a substantial question of federal law.' [Plaintiff's] federal constitutional claims, which turn exclusively on federal law, unquestionably fit within this rule.... By raising several claims that arise under federal law, [plaintiff] subjected itself to the possibility that [defendant] would remove the case to the federal courts.[13]

In its Petition, Grable wholly ignores this holding.

The District Court also analyzed Sixth Circuit case law such as *Long v. Bando Manufacturing of America,*[14] which relied on *City of Chicago.* The Sixth Circuit in *Long,* held that a federal court has subject matter jurisdiction "if a substantial federal question of great federal interest is raised by a complaint framed in terms of state law, and if resolution of that federal question is necessary to the resolution of the state-law claim."[15] The Sixth Circuit in *Long* also recognized and interpreted this Court's decision in *Merrell Dow Pharmaceuticals, Inc. v. Thompson,*[16] wherein the Court "clearly left open the possibility of federal jurisdiction even in the absence of an express or implied federal cause of action."[17] The District Court ultimately held:

> In this case a legitimate argument can presumably be made as to whether the question of federal law raised in this complaint, i.e., the application of 26 USC section 6335(a) is in fact a "substantial question" of federal law. In this court's considered opinion, the answer to that

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[12] Franchise *Tax Bd.*, 463 U.S. at 8-9 (citing *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916); and *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921)).

[13] *City of Chicago*, 522 U.S. at 164 (citations omitted). *See also Aetna Health v. Davilla*, 124 S.Ct. 2488, 2494 (2004) (citing *Franchise Tax Bd.*, 463 U.S. at 9-10); *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 475 (1998) (quoting *Franchise Tax Bd.*, 463 U.S. at 22).

[14] 201 F.3d 754 (6th Cir. 2000).

[15] *Long*, 201 F.3d at 759 (citing *Merrell Dow Pharmaceuticals v. Thompson*, 478 U.S. 804 (1986), and *City of Chicago*, 522 U.S. at 164) (a case may "arise under" the laws of the United States if it requires resolution of a substantial question of federal law even if state law creates the Grable's cause of action)).

[16] 478 U.S. 804 (1986).

[17] *Long*, 201 F.3d at 759 (citing *Merrell Dow*, 478 U.S. at 805).

question has to be in the affirmative. In no other way would purchasers of property from the federal government that was acquired in tax sales have the ability to rely upon the title they received from the Internal Revenue Service if the law required that, every time a dispute between the federal government and a taxpayer arose, the purchaser at tax sale had to defend the title in state court over claims that the Internal Revenue Service had failed to follow federal law, particularly where in most, if not all, such actions there is no reason for the taxpayer to have even been aware at the time of the purchase at the tax sale of compliance or lack of compliance by the Internal Revenue Code of federal law. Accordingly, this court concludes that the Grable's claim does pose a "significant question of federal law."[18]

The District Court thoroughly analyzed and discussed decisions of the Sixth Circuit and the United States Supreme Court during the remand hearing regarding subject matter jurisdiction and its decision is sound.

2. The Jurisdiction Issue In This Case Is Moot.

Grable would like to ignore the fact that the United States was interpled as a party to this case long before the final order dismissing the case was entered. At the time Darue filed its Notice of Removal, Darue informed Grable that the United States would be brought into the case because

[18] Transcript of District Court Hearing on Petitioner's Motion to Remand on April 2, 2001, at 17; attached as Respondent's Appendix 1.

of the accusations in the Complaint. True to its word, on April 13, 2001, Darue interpled the United States into the case. The final opinion in this matter, which is the opinion being appealed, did not occur until March 22, 2002, almost a year after the United States became a party.

While Darue acknowledges that the District Court must have jurisdiction at all times – *see* Section B.1., *supra* – it would be a waste of judicial resources to remand this case to state court at this point because Darue will – once again – interplead the United States and remove the case from state court to District Court under 28 U.S.C. §§ 1346, 1340, and/or 2410. The identical arguments will again be presented before the same District Court and the same result will occur. Grable's Complaint will be dismissed.

The District Court had subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1346(b), which states:

> (b)...the district courts shall have exclusive jurisdiction of civil claims against the United States, for money damages, accruing on or after January 1, 1945, for injury or loss of property,...caused by the negligent or wrongful action or omission of any employee of the government by acting within the scope of his office or employment, under circumstances where the United States, if a private person, will be liable to the claimant in accordance with the law of the place where the act or omission occurred.

A case Grable relies upon in its Petition also supports asserting jurisdiction in this case. In *Aqua Bar & Lounge v.*

U.S. Dept. of Treas.,[19] the Court ruled that it had subject matter jurisdiction over a quiet title claim. The Court stated:

> Characterizing its suit as one to quiet title to property on which the United States has a lien, plaintiff asserts that the district court had jurisdiction to hear this action under 28 USC § 1340 in combination with 28 USC § 2410(a)(1). Section 1340 of the Judicial Code grants the federal district courts "original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue." Clearly, a suit which contests the validity of a federal tax lien and sale falls within its terms.[20]

Since the United States became a necessary party to this lawsuit, it makes sense to have a federal court decide whether a federal agency, such as the IRS, complied with a federal statute, I.R.C. § 6335. The Court should be mindful of Grable's ploy. It purposely filed the action in state court and disguised it as a state court action, so Grable could avoid the United States government and the federal courts.

C. The Sixth Circuit Was Correct In Holding The District Court Had Original Jurisdiction.

Grable also attempts to criticize the Sixth Circuit's analysis. The Sixth Circuit's decision, however, is sound.

Contrary to Grable's assertion that the Sixth Circuit relied upon statues that were not relied upon by the District Court or Darue, the Sixth Circuit cited 28 U.S.C. §§ 1441(a), 1331, and 1340 – the very statutes the District Court and

[19] 539 F.2d 935 (3d Cir. 1976).
[20] *Id.* at 937 (citations omitted).

Darue cited. The Sixth Circuit did not rely on 28 U.S.C. § 1340, as alleged by Grable. In fact, after briefly citing § 1340, the Sixth Circuit stated that "Federal courts also have original jurisdiction over claims 'arising under the Constitution, laws, or treatises of the United States.' 28 U.S.C. § 1331."[21] The Court then stated that the "key question is whether Grable's quiet-title action, based as it is on the faulty process in a tax seizure, 'arises under' federal law and thus invokes federal court jurisdiction."[22] The Sixth Circuit clearly chose to rely upon 28 U.S.C. § 1331; not 28 U.S.C. § 1340.

The Sixth Circuit began its analysis by citing to the United States Supreme Court's opinion in *Taylor v. Anderson*,[23] which held that whether a claim presented a federal question "must be determined from what necessarily appears in the plaintiff's statement of his own claim."[24]

Again, contrary to Grable's assertion, the Sixth Circuit's opinion did not eliminate the necessity of proving original jurisdiction of the District Courts in a removal situation. The District Court has original jurisdiction if the case "arises under" federal law. The Sixth Circuit recognized this as the proper battleground and after careful analysis of the following cases, upheld the District Court's opinion that it had original jurisdiction to decide this case:

> The long history of Supreme Court guidance concerning the meaning of 'arising under' the laws of the United States has been synthesized into a three part test. Although formulations differ slightly among the

[21] *Grable & Sons Metal Products v. Darue Engineering & Mfg.*, 377 F.3d 594, 594 (6th Cir. 2004).
[22] *Id.* at 594-95.
[23] 234 U.S. 74 (1914).
[24] *Id.* at 75-76.

circuits, a federal question may arise out of a state law case or controversy if the plaintiff asserts a federal right that 1) involves a substantial question of federal law; 2) is framed in terms of state law; and 3) requires interpretation of federal law to resolve the case. *Long v. Bando Mfg. of America*, 201 F.3d 754, 759 (6th Cir. 2000); *see e.g. Howery v. Allstate Insurance Co.*, 243 F.3d 912, 918 (5th Cir.), *cert. denied*, 534 U.S. 993 (2001); *Seinfeld v. Austin*, 39 F.3d 761, 763 (7th Cir. 1994), *cert. denied sub nom. Abbot Labs v. Seinfeld*, 514 U.S. 1126 (1995). The asserted federal rights in this case, personal notification of seizure of property as provided by IRS regulations, fulfills these three requirements.[25]

Based on the above analysis, the Sixth Circuit acknowledged that Darue had the burden of proof regarding the jurisdictional issue since it previously held that the burden of proof is on the party removing a case to federal court in *Long*, which it cited in its opinion.

Grable cites *Seinfeld v. Austin*,[26] in its Petition to support its position that a district court only has jurisdiction if there is a private cause of action arising out of federal law between the two parties. Such a holding is inconsistent with this Court's previous and long-standing jurisdictional cases.[27] Further, it is questionable whether the Seventh

[25] *Grable & Sons*, 377 F.3d at 595.

[26] 39 F.3d 761, 763 (7th Cir. 1994), *cert. denied sub. nom. Abbot Labs v. Seinfeld*, 514 U.S. 1126 (1995).

[27] *See Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921) *Franchise Tax Bd .*, 463 U.S. 1 (1983); and *City of Chicago*, 522 U.S. 156 (1997). Also note, Grable cites this Court's decision in *Wilder v. Virginia Hospital Assn.*, 496 U.S. 498 (1980) as support for its position.

Circuit even intended for *Seinfeld* to apply in this context. As the First Circuit aptly noted in *Templeton Board of Sewer Comm'rs. v. American Tissue Mills of Mass.*, "*Seinfeld* failed to address the discrete class of cases where a substantial federal question may confer jurisdiction under § 1331."[28]

Even assuming, however, that the *Seinfeld* court did address the substantial federal question jurisdictional issue (which is the second category of federal jurisdiction held to exist by *Franchise Tax Bd.* and *City of Chicago*), Grable's argument in its Petition that a federal court lacks jurisdiction unless a plaintiff has a private cause of action created by federal law completely eviscerates *Franchise Tax Bd.'s* second category of federal jurisdiction. If Grable is correct, the second category of federal jurisdiction will effectively collapse into the first category of federal jurisdiction also held to exist by *Franchise Tax Bd.*, which allows federal jurisdiction if a federal law created a state law action. In essence, there would be only one test for federal jurisdiction, not two. Such an argument, however, is against the great weight and history of Supreme Court doctrine on this issue. Specifically, Grable's argument is simply irreconcilable with this Court's longstanding principle of *Smith*, *Franchise Tax Bd*, and *City of Chicago* which hold that there are two ways a state claim can "arise under" federal law: (1) federal law creates the state claim: or (2) vindication of a state law right necessarily turned on the construction of federal law.

The position taken by the Seventh Circuit in *Seinfeld*, and by the Petitioners in this case, draws the line for "arising under" jurisdiction in these cases – state law cases which necessarily turn on construction of federal law – at the

Although not expressly overruled, *Wilder* has been so restricted by subsequent holdings of the Supreme Court and approximately 40 other federal courts that its continued precedential viability is suspect.

[28] 352 F.3d. 33, 39 (1st Cir. 2003).

question of whether the federal law in issue creates a private right of action. This Court, however, has drawn that line at the question of whether the federal question is "substantial," not at the question of whether it creates a private right of action. In that this Court has not overruled its longstanding doctrinal rule of *Smith* and *Franchise Tax Bd.*, Grable's attempt to redraw the line is simply unsupportable.

Finally, if the Court were to reverse the Sixth Circuit's decision and, in so doing overrule the longstanding principles of *Smith* and *Franchise Tax Bd.*, the consequence would be that an entire class of cases, which logic and reason dictate do "arise under" federal law would be excluded from federal court jurisdiction. A clever plaintiff could exploit this and avoid federal court by couching what is clearly a federal question in state law terms.

Perhaps seeing the inherent weakness in its argument, Grable next attempts to argue that *Franchise Tax Bd.*'s and the Sixth Circuit's decisions are inconsistent. *Franchise Tax Bd.* held that the "arising under" jurisdiction will be appropriate when the only question in the case is an interpretation of federal law and the federal question is "substantial."[29] The Sixth Circuit accounted for this in its holding by incorporating the "substantial question of federal law" element into its three-part test.

Regarding the two lower court cases cited by Grable in its Petition for the proposition a plaintiff may have a federal right but have that right be unenforceable in federal court, Grable misinterprets the cases it cites. In *Little River Farms v. U.S.*, the federal court held that it had jurisdiction to hear the case and stated that the taxpayer had a right under one federal statute and a remedy for enforcing that right

[29] *Franchise Tax Bd.*, 463 U.S. at 13. *See also City of Chicago*, 522 U.S. at 164.

under another federal statute.[30] Regarding *Popp v. Eberlein*, the Seventh Circuit ultimately agreed that the lower district court had jurisdiction to hear and decide the case even though a state court could also decide the case.[31] This is consistent with the District Court's reasoning in this case. Judge McKeague reasoned:

> I don't think there is any doubt that, absent a removal petition, that the state courts could make this determination. Lots of things are matters of concurrent jurisdiction between the state and federal court system. . . so I don't think we have to spend a lot of time arguing about that.[32]

Grable attempts to deflect the District Court's and Sixth Circuit's sound reasoning and holding with inapplicable and doctrinally inconsistent case law. Grable would like to characterize this case as a typical quiet title action. This case, however, is unlike a traditional quiet title action and has an abundance of unique facts. This case arises under federal law of the United States because Grable's claim will be substantiated if I.R.C. §§ 6335 and 6339 are given one construction and it will fail if it is given another construction. State law is not, under any stretch of the imagination, the basis of this claim.

[30] 328 F.Supp. 476 (N.D.Ga. 1971).

[31] 409 F.2d 309 (7th Cir. 1969), *cert. denied*, 396 U.S. 909 (1969).

[32] Transcript of District Court Hearing on Petitioner's Motion to Remand on April 2, 2001, at 6; attached as Respondent's Appendix 1.

SECOND QUESTION PRESENTED: SUBSTANTIAL COMPLIANCE WITH I.R.C. § 6335 IS SUFFICIENT WHERE THE TAXPAYER RECEIVED ACTUAL NOTICE

A. Reason for Denying the Writ

The Petition for Writ of Certiorari should be denied because case law regarding the interpretation of I.R.C. §§ 6335 and 6339 is clear. Strict compliance is required when only I.R.C. § 6335 is involved and substantial compliance is required when I.R.C. § 6339 or equitable concerns become involved. There are no splits in the circuit regarding I.R.C. § 6335. The undisputed facts Grable fails to mention in its Petition distinguish this case from all the cases Grable cites.

B. The District Court and Sixth Circuit Were Correct in Dismissing Grable's Case As a Matter of Law Because There Was No Genuine Issue of Material Fact that the United States Complied with I.R.C. § 6335 When Grable Received Actual Notice That the United States Was Seizing Its Property.

In its Petition, Grable relies upon case law that is factually inapposite to this case. As discussed in more detail below, the cases Grable cites are premised upon either a taxpayer failing to receive notice prior to the IRS seizing and selling the taxpayer's property or the taxpayer suing the IRS prior to the IRS selling the property. In these factual situations, strict compliance with I.R.C. § 6335 is required because the purpose of the notice requirement has either not been met or the taxpayer has promptly attempted to redeem his or her property before the procedures of I.R.C. § 6339 and an innocent third party becomes involved.

This case, however, is very different. In this case, Grable received actual notice—both by certified mail and personal service—prior to the IRS seizing and selling Grable's property and Grable failed to legally redeem its property. Because of Grable's silence, the IRS sold Grable's property to Darue. Six years later Grable sued Darue seeking an equitable remedy to quiet title on its property. Since a tax sale of Grable's property was completed before Grable initiated this action, the less stringent "substantial compliance" rule of I.R.C. § 6339 applies to the case. Further, like the numerous cases cited below, in situations like this, because the statutory purpose – actual notice – has been accomplished and Grable failed to promptly act upon receiving such notice, Grable is barred from coming into court seeking equitable relief.

1. Actual Notice is Sufficient to Validate a Tax Sale.

Federal courts have held that where the taxpayer receives actual notice prior to the sale, fails to act upon that notice, and then attempts to come into court and seek equitable relief, that taxpayer's claim fails based on I.R.C. §§ 6335 and 6339. *Kaggen v. IRS*, 71 F.3d 1018 (2nd Cir. 1995) (holding that where a taxpayer receives actual notice of his seizure of property, although not in the specified manner, the requirements of I.R.C. § 6335(a) have been fulfilled); *Vote v. U.S.*, No. 90-16116, 930 F.2d 31 (Table), 1991 WL 54876 (9th Cir. Apr. 12, 1991), *aff'd*, No. 93-15774, 26 F.3d 135 (Table), 1994 WL 245835 (9th Cir. Jun. 7, 1994) (recognizing the Second Circuit has required strict compliance with the notice requirement but distinguishing those cases where the delinquent taxpayer received actual prior notice of the sale and failed to act); *McCoy v. U.S.*, Civ. A. No. CA 5-91-273-C, 1992 WL 210090 (N.D.Tex. Jul. 17, 1992) (refusing to void sale of ranch where plaintiff received

actual prior notice of seizure and sale by certified mail);[33] *Van Skiver v. U.S.*, 751 F.Supp. 1522 (D.Kan. 1990) (holding that plaintiffs cannot invalidate the sale of their property for the IRS's failure to personally serve notice of sale where they received actual notice by certified mail a week prior to the sale and failed to act during the 180-day redemption period); *Olson v. U.S.*, CIV. No. 88-763, 1990 WL 132474 (W.D.Pa. Jul. 5, 1990) (since actual notice is the reason for the hand-delivery requirement of I.R.C. § 6335, we hold that plaintiff cannot defeat the motion for summary judgment due to the IRS's technical failure when they received actual notice); and *Arch Flying Association v. U.S.*, No. 96-0663-CV-W-5, 1997 WL 873544 (W.D.Mo. Dec. 11, 1997) (stating that a failure to strictly comply with the notice provisions of I.R.C. § 6335(a) does not invalidate a sale when the taxpayer received actual notice of the sale.)

The Third Circuit has also held that notice by certified mail complied with the requirements of I.R.C. § 6335.[34] On facts practically identical to the present case, the taxpayers in *Kabakjian* claimed the United States did not comply with I.R.C. § 6335 because it sent the notice of seizure by certified mail instead of hand delivery. The taxpayers received actual notice of the seizure, however, by the certified mailing. The United States subsequently sold the taxpayer's property to a third party. The Third Circuit held that such notice complied with §§ 6335 and 6339.[35]

The Third Circuit reasoned that the purpose of the notice provisions was met when the taxpayer received actual

[33] The court in *McCoy*, sitting in the Fifth Circuit, clearly did not read the "strict compliance" language in *Reece v. Scoggins*, 506 F.2d 967 (5th Cir. 1975) – a case Grable has cited to support its position – to preclude consideration of equitable factors. *See also Kabakjian v. U.S.*, 92 F.Supp.2d 435 (E.D.Pa. 2000), *aff'd*, 267 F.3d 208 (3d Cir. 2001).

[34] *Kabakjian v. U.S.*, 267 F.3d 208, 213 (3d Cir. 2001).

[35] *Id.* at 213.

notice.[36] The court further ruled that the holding was consistent with I.R.C. § 6339(b)(2).[37] I.R.C. § 6339(b)(2) provides title transfer from the United States to a third party if there has been *substantial compliance* with the notice and other procedures set out in I.R.C. § 6335.[38] The Court rationalized the two statues by ruling that, because the taxpayers received actual notice under I.R.C. § 6335 and the taxpayers failed to show that they were meaningfully prejudiced by receipt of the I.R.C. § 6335 notices by certified mail instead of personal delivery, the United States complied with I.R.C. §§ 6335 and 6339.[39] In fact, the district court in *Kabakjian* stated that it would be a "rare case . . . in which a taxpayer who did timely receive actual notice can establish damages as a proximate result of the failure to strictly comply with the prescribed mode of service" under I.R.C. § 6335.[40]

The *Kabakjian* court went on to hold that I.R.C. § 6339(b)(2) indicates that title is conveyed if the sale is "substantially in accordance with the provisions of the law" and the IRS's notice of seizure and sale by certified mail, while not in literal compliance with I.R.C. § 6335, did provide the taxpayers with actual notice, thus providing substantial compliance.[41]

Howard v. Adle,[42] is a Michigan District Court case that is also factually identical to the present case. In *Howard*, the IRS mailed—instead of personally serving—plaintiffs a notice that their property would be seized and

[36] *Id.* at 213.

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Kabakjian v. U.S.*, 92 F.Supp.2d 435, 442 *aff'd.* 267 F.3d 208 (3d. Cir. 2001).

[41] *Kabakjian supra* at *3 (E.D.Pa. Dec. 22, 1998).

[42] 538 F. Supp. 504 (E.D. Mich. 1982).

sold because of delinquent taxes. Plaintiffs received the notice. Despite having actual notice prior to the sale, plaintiffs failed to pay their taxes or redeem the property during the redemption period. It was only after defendant purchased the property, that plaintiffs sued defendant, in equity, to quiet title on the theory that the IRS failed to comply with the notice requirement of I.R.C. § 6335.

The plaintiffs in *Howard*, like Grable, argued that, although they received actual notice through the mail, the tax sale was void because the IRS failed to personally serve them the notice as required under I.R.C. § 6335. The plaintiffs cited numerous cases in other circuits to support their argument that strict compliance is required under I.R.C. § 6335 for a tax sale to be valid (ironically, some of the same cases the plaintiffs relied upon in *Howard* have been relied on by Grable). The defendant in *Howard* admitted that the IRS did not strictly comply with the requirements of I.R.C. § 6335, but argued that, because the delinquent taxpayers received actual notice prior to the sale and failed to act promptly to redeem their property, they were now estopped from seeking any equitable remedy. The Court agreed with the defendant and dismissed plaintiffs' quiet title action.[43]

The *Howard* court's analysis did not end with I.R.C. § 6335.[44] The court reasoned that, because plaintiffs sought equitable relief, they must also show that they themselves have done equity.[45] The Court stated the general rule in Michigan: "where. . . a serious defect occurs in the tax sale, it may be attacked by the owner of the premises, *provided he*

[43] *Id.* at 509.
[44] *Id.* at 508.
[45] *Id.* at 508 (citing *McAndrews v. Belknap*, 141 F. 2d 111, 115 (6th Cir. 1944)).

acts promptly and does equity."[46] The court went on to reason that plaintiffs' failure to notify the IRS or defendant during the redemption period and their attempt to redeem the property only at the last minute through a lawsuit estopped them from pursuing their claim in equity.[47]

The court in *Howard* also distinguished plaintiffs' cited cases regarding literal compliance as necessary under I.R.C. § 6335 on two grounds. First, the plaintiffs' cases simply found that non-compliance with the notice requirements rendered the sale voidable without considering whether or not the taxpayer was even entitled to equitable relief under state law. Second, none of the taxpayers in those cases received actual notice prior to the sale.[48] In *Howard*, however, there was no dispute that plaintiffs received actual notice. Thus, the purpose of the statutory notice requirements – to allow the taxpayer an opportunity to be present at the tax sale and bid on the property – was met.[49] As a result, the rules of equity prevented plaintiffs from recovering their property.

The present case is factually indistinguishable from the *Howard* case. There is no dispute that Grable received actual notice that the IRS was seizing its property. Like the plaintiffs in *Howard*, despite receiving actual notice, Grable failed to buy the Property at the sale, or redeem the Property after it was sold. Additionally, Grable failed to argue strict compliance of I.R.C. § 6335 – or argue anything for that matter – when the IRS sued Grable. Instead, six years after the sale, Grable sued Darue in equity seeking to quiet title.

[46] *Id.* (emphasis added) (quoting *Detroit Trust Co. v. Lieberwitz*, 275 Mich. 429, 436 (1936)). *See also Blondin v. Griffin*, 133 Mich. 647, 95 N.W. 739 (1903).
[47] *Id.* at 508.
[48] *Id.* at 509.
[49] *Id.*

As explained in *Howard*, in order to recover in equity, Grable must have done equity. Grable failed to do so.

In the *Village of Dimondale v. Grable,*[50] – a previous case regarding Grable – the Village sued Grable to quiet title to real property. The Village argued that Grable's inequitable delay in acting on his rights to redeem the property barred his claim to the property. The Court held that because Grable *was the defendant* in the case and did not initiate the equitable action to quiet title, the equitable argument was unpersuasive.[51] The Court, however, went on to claim that if the taxpayer *was the plaintiff* who brought a lawsuit to quiet title, he would be opening the door to the claim that he failed to act in equity and thus, could not recover.[52] The court observed the equity is a shield, not a sword.[53] Here, Darue has properly invoked equity as a shield to protect the validity of title it received so many years ago. According to Grable's own previous case, Grable's quiet title action must fail.[54]

Grable is now the plaintiff suing in equity and has failed to act with reasonable promptness to redeem the Property. Thus, Grable should be estopped from receiving equitable relief when, in fact, Grable has not done equity itself. Notice requirements under I.R.C. § 6335 are designed to protect the taxpayer by giving him "an opportunity to be present at the tax sale and bid on the property."[55] Notice provisions also allow the taxpayer to protect his interest in

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[50] 240 Mich. App. 553, 618 N.W. 2d 23 (2000).

[51] *Id.* at 569-70, 618 N.W.2d at 31.

[52] *Id.* at 570, 618 N.W.2d at 31-32.

[53] *Id.*

[54] The rule of equity that bars Grable's claims has been established in Michigan law for almost one hundred years. *See Blondin v. Griffin,* 133 Mich. 647, 648; 95 N.W. 739, 739 (1903).

[55] *Howard,* 538 F. Supp. at 509 (quoting *Reece v. Scroggins,* 506 F.2d 967 (5th Cir. 1975)).

the property and provide him with adequate due process.[56] Grable had every opportunity to protect its purported interest and chose not to do so.

2. The Cases Grable Cites Are Inapplicable.

Significant factual dissimilarities between the cases Grable cites in its Petition to support its I.R.C. § 6335 strict compliance argument and this case are evident. Grable relies on *Reece v. Scoggins*[57] and *Aqua Bar & Lounge, Inc. v. U.S. Dept. of Treas.*[58] for the principle that a tax sale should be rendered void when the IRS fails to comply with the notice requirements of I.R.C. § 6335.

Reece and *Aqua Bar* are distinguishable from this case for at least two reasons. First, neither *Reece* nor *Aqua Bar* considered whether the taxpayer was entitled to equitable relief as a plaintiff.[59] Second, in *Reece* and *Aqua Bar* there was a dispute whether the taxpayer received actual prior notice of the sale and seizure of the taxpayer's property.[60] Thus, "there was a substantial issue whether the taxpayer had been given 'an opportunity to be present at the tax sale and bid on the property', the central purpose of the statutory notice requirements."[61]

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[56] *Verba v. Ohio Casualty Ins. Co.,* 851 F.2d 811, 816 (6th Cir. 1988).

[57] 506 F.2d 967 (5th Cir. 1975).

[58] 438 F. Supp. 655 (E.D. Pa. 1977).

[59] *Howard,* 538 F.Supp. at 508-09.

[60] *Id.*

[61] *Id.* (*Reese and Aqua Bar* were also considered and found inapplicable by the federal court in *Howard*). *See also Kabakjian v. U.S.,* 92 F.Supp.2d 435 (E.D.Pa. 2000), *aff'd,* 267 F.3d 208 (3d Cir. 2001) (distinguishing the taxpayer's case law supporting the position that strict compliance is necessary under I.R.C. § 6335, of which one case was *Reece*).

In this case, unlike *Reece* and *Aqua Bar*, Grable received actual prior notice of the seizure of its property. In fact, Grable also received–via personal service–notice of the sale of its property. There is absolutely no dispute that Grable received prior written notice of both the seizure and sale of its property and that it had the opportunity to be present and bid at the tax sale. Grable's reliance on *Reece* and *Aqua Par* is an attempt to gloss over the equitable hurdles it must overcome. As reasoned by the District Court in *Howard*, this Court must decide whether Grable is entitled to equitable relief before it can render the IRS's sale of Grable's property to Darue void. Grable misconstrues the equitable argument for obvious reasons; it knows it will fail. Grable's reliance on *Reece* and *Aqua Bar* simply does not support its argument for strict interpretation of I.R.C. § 6335.

Grable also cites *Goodwin v. U.S.*,[62] for the strict compliance approach to I.R.C. § 6335. This case too, has been distinguished by a subsequent case cited earlier in this Brief. In *Kabakjian*,[63] – a case where the taxpayer received notice by certified mail, failed to take any legal action, and as a result, the IRS sold the property to a third party – the taxpayer claimed that the IRS did not comply with I.R.C. § 6335 because the taxpayer was not personally served with the notice of seizure. The taxpayer in that case cited *Goodwin* for the proposition that personal service of the notice of seizure was required for the IRS's tax sale of the taxpayer's property to be valid. In distinguishing *Goodwin*, the *Kabakjian* court noted – as does Darue – that the property at issue in *Goodwin* had not been sold to a third party at the time the legal action was taken. The plaintiff in *Goodwin* actually sought to stop the sale because of the IRS's failure to comply with I.R.C. § 6335 and thus, I.R.C.

[62] 935 F.2d 1061 (9th Cir. 1991).

[63] *Kabakjian v. U.S.*, No. Civ.A. 97-5906, 1998 WL 962124, at *3 (E.D.Pa. Dec. 22, 1998).

§ 6339 and an innocent third-party purchaser were not involved in *Goodwin* like they were involved in *Kabakjian*, and are involved here. Therefore, Grable's analysis of *Goodwin* is incomplete and inapplicable.

Kulawy v. U.S.,[64] is another case Grable cites for its position that strict compliance with I.R.C. § 6335 is required. Again, unlike Grable, the taxpayer in *Kulawy* attempted to redeem his personal property *before* the IRS sold the property to a third party. Thus, any reliance on *Kulawy* is misplaced because it did not take into consideration I.R.C. § 6339 or any of the equitable arguments present in this case. Moreover, *Kulawy* dealt with a provision of I.R.C. § 6335(d) that is not relevant to this case.

Grable also uses *Powelson v. U.S.*,[65] as another example that I.R.C. § 6335 must be strictly followed. This case is also inapplicable. In *Powelson*, the IRS argued that it complied with I.R.C. § 6335 by mailing the taxpayer the notice because the taxpayer could not be readily located. This is not what Darue is arguing in this case. Darue is arguing that Grable received actual prior notice of the IRS seizure and sale of its property. Despite receiving such notice, Grable repeatedly failed to recover the property or pursue any legal action to get the property back until six years after the property was sold to Darue. At that time, Grable initiated a lawsuit against Darue seeking an equitable remedy: to quiet title. It is because Grable is attempting to recover in equity when Grable sat on its rights and has done no equity itself for the last six years that Darue is arguing that this case does not end with an analysis of I.R.C. § 6335. Equitable factors are involved. And because the IRS already sold the property to Darue, I.R.C. § 6339 becomes relevant in determining the correct outcome of this case.

[64] 917 F.2d 729 (2nd Cir. 1990).

[65] 979 F.2d 141 (9th Cir. 1992), *cert. denied*, 507 U.S. 1029 (1993).

Although Grable asserts in its Petition that "even the Sixth Circuit was previously in line with the need for the IRS to strictly comply with the notice requirements of I.R.C. § 6335(a)," Grable misapplies the two Sixth Circuit cases it cites. While *Verba v. Ohio Casualty Ins. Co.*[66] addresses I.R.C. § 6335, it only stated that more than constructive notice is required. Additionally, Grable cited *McAndrews v. Belknap*.[67] The court in *McAndrews* held that if a plaintiff seeks equitable relief, it must also show that they themselves have done equity.[68] It is clear that Grable has shown no equity or prejudice in this case.

Grable also attempts to cite certain United States Supreme Court decisions to support it argument that courts cannot resort to equity to justify a violation of the law. Obviously, that is not what this case is about nor is it what either the District Court or Sixth Circuit held. This case's unique facts simply put this case squarely into the unambiguous language and control of I.R.C. § 6339. It is this section, not solely equity principles, that supports the District Court and Sixth's Circuit's decision that the United States complied with the Internal Revenue Code when it provided Grable with actual notice of its seizure of Grable's property.

3. I.R.C. § 6335, When Read With I.R.C. § 6339, States That Substantial Compliance is Sufficient to Validate a Tax Sale.

Because the United States already sold the Property, this case cannot be decided without also considering and interpreting I.R.C. § 6339. Under I.R.C. § 6339, "In the case

[66] 851 F.2d 811 (6th Cir. 1988).
[67] 141 F.2d 111 (6th Cir. 1944), *cert. denied*, 323 U.S. 721 (1944).
[68] *Id.* at 115.

of sale of real property pursuant to I.R.C. § 6335. * * * If the proceedings have been *substantially in accordance* with the provisions of law. . . ." all rights a delinquent taxpayer has in the real property is conveyed to the purchaser from the United States. Thus, the "proceedings" are the seizure and sale of property and the "provisions of law" with which the IRS must be "substantially in accordance" are those contained in I.R.C. § 6335.

Cases that discuss I.R.C. § 6335 rarely discuss I.R.C. § 6339 because a taxpayer that is legitimately and equitably asserting its rights will file suit before the IRS sells the property to a third party. However, when that sale is completed, courts cannot interpret I.R.C. § 6335 without also interpreting I.R.C. § 6339. Once the property is sold, those statutes recognize that the process has progressed so far that it will not be voided if there has been "substantial compliance." In finding that I.R.C. § 6339 only requires substantial compliance with the notice requirement of I.R.C. § 6335, the district court in *Kabakjian* stated:

> Interestingly, virtually none of the courts stating that strict compliance with I.R.C. § 6335 is required addressed the import of § 6339(b)(2) which provides that all interest in and title to the delinquent property are effectively conveyed if the IRS proceeds in a manner 'substantially in accordance with the provisions of law.'[69]

Here, because Grable's Property was sold to Darue, I.R.C. § 6335 cannot be read in isolation. Grable received actual notice prior to the seizure and sale of the Property and failed to redeem the Property or raise a claim. Thus, the

[69] *Kabakjian v. U.S.*, No. Civ.A. 97-5906, 1998 WL 962124, at *3 (E.D.Pa. Dec. 22, 1998).

United States sold the Property to Darue. Once the sale was complete, I.R.C. § 6339 controlled the reading of I.R.C. § 6335 and only substantial compliance was necessary. Grable is not merely attempting to invalidate the IRS's seizure, it is attempting to deprive Darue of property it purchased six years ago. The sale was valid under I.R.C. § 6339.

Grable wants to begin and end the analysis of this case with strict compliance regarding I.R.C. § 6335. If Grable had acted promptly, it perhaps could have. Because of Grable's unreasonable delay, this case cannot begin and end with I.R.C. § 6335. This case is decided upon the language of I.R.C. §§ 6335 and 6339. Once Grable's Property was sold and Darue became involved, the less stringent requirement of "substantial compliance" controls. Therefore, the District Court's and Sixth Circuit's dismissal of Grable's claims as a matter of law was proper.

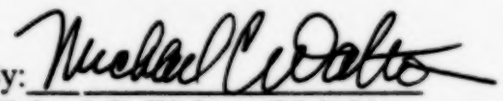
CONCLUSION

For the reasons articulated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

RHOADES MCKEE
Attorneys for Respondent

Dated: November 29, 2004

By: 

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APPENDIX

APPENDIX 1

TRANSCRIPT AND ORAL OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, DATED AND FILED: APRIL 2, 2001

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GRABLE & SONS METAL PRODUCTS, INC.,
a Michigan corporation,

Plaintiff,

vs. No. 1:01-CV-37

DARUE ENGINEERING & MANUFACTURING,
INC., a Michigan corporation,

Defendant.
_____/

MOTION TO REMAND
BEFORE THE HONORABLE DAVID W. McKEAGUE
UNITED STATES DISTRICT JUDGE
Lansing, Michigan, April 2, 2001, at about 1:35 P.M.

APPEARANCES:

J. Thomas Schaeffer
206 South Kalamazoo
Marshall, MI 49068
On behalf of the Plaintiff;

Michael C. Walton
Rhoades, McKee, Boer, Goodrich &Titta
161 Ottawa Avenue, N. W., Suite 600
Grand Rapids, MI 49503
On behalf of the Defendant.

Court Reporter: Sharon E. Fox. CSR-3342
315 West Allegan Avenue
Lansing, MI 48933
(517) 484-8083

Lansing, Michigan

April 2, 2001, 1:35 P.M.

(Call to order of the court.)

THE COURT: Please be seated. Sorry for the brief delay.

This is the matter of Grable & Sons Metal Products, Inc., versus Darue Engineering & Manufacturing, Inc.

Appearing on behalf of the plaintiff is Mr. Schaeffer. Appearing on behalf of the defendant is Mr. Walton.

This is the time set for a hearing on the plaintiff's motion to remand this case to the Circuit Court for the County of Eaton from which it was removed.

The court has reviewed the motion and the response and reply.

Mr. Schaeffer, this is your motion, so you may proceed.

MR. SCHAEFFER: Thank you, Your Honor. May it please the court. As set forth in our motion and memorandum, it is the plaintiff's position that the action brought in Eaton County was to quiet title and that the case law as set forth in the memorandum indicates that a quiet title action is a state court action and not a federal court action. The memorandum goes through and discusses some of the concerns that defendant had in its position of asking that this be removed to the federal court, and I don't think they have merit.

The courts have indicated on a quiet title that the state courts have the ability to interpret and implement federal law if, in fact, it's a quiet title action, and that's all that this is. It's one party against another party, it's not against the government, and the determination has to be made in state court along the state court rules and law as to whether or not title should be quieted in behalf of plaintiff as pled.

THE COURT: I agree with you that in general a quiet title action is traditionally viewed as a state court action. There is no diversity here, so we're looking at whether there is a federal question that's presented on the face of the complaint.

As you know, under federal law the action is deemed to arise under federal law if a federal law created the cause of action, which is not true here, or, and this is the more important part, where vindication of a state law right, which would be the traditional quiet title action, necessarily turns on some construction of federal law. That's what Franchise Tax Board versus Construction Laborers tells us. Now, while there is no question that there are a number of cases where these type of actions have been maintained in federal court, as Mr. Walton has indicated, they don't seem particularly persuasive to me because there really isn't any analysis of

what I believe to be the essential underlying legal question in those cases. They simply sort of assume that it turns on the construction of some federal law.

What it seems to me the question is here is whether under the unique facts of this case, if this matter was heard in the Eaton County Circuit Court as a traditional state quiet title action, would the case turn on some construction of federal law? Now, the reason why that seems to me to become particularly important under the facts of this case is that when you look at your complaint, particularly paragraphs 10 and 11, it appears as if the entire basis of the claim by Grable that Darue's deed is void is that the IRS that, as I understand it, took title to this property, I assume because of failure to pay taxes, and then conveyed it in a tax sale to Darue, whether they had failed to strictly comply with the notice requirements of federal law. If I'm right about that, does not the underlying question that the state court would be asked to resolve if I remanded this back turn on the proper construction of federal law, in other words, whether the IRS was required to proceed in one way versus another way and the manner in which they gave notice to the corporation that they were taking title to this property?

MR. SCHAEFFER: I think that it turns on state law as to whether or not there was proper transfer of title to Darue, and obviously that has to do with the procedures that the IRS did or did not go through at the time of their actions.

THE COURT: Are the procedures that you contend the IRS was required to go through and failed to go through matters of state law or matters of federal law? They're matters of federal law, are they not?

MR. SCHAEFFER: Well, the underlying part is federal law as to whether or not they followed 6335(a) in relation to the notice of seizure, but I think it's state law as to

whether or not this ownership or claim of title by Darue or the transfer to the IRS to Darue was void ab initio in relation to what they transferred or what Darue purchased at the time that they purchased it.

THE COURT: But is it void ab initio, as you say it, as a matter of state law because state law was violated or is it void ab initio under state law because the IRS violated or failed to follow the procedural requirements of federal law?

MR. SCHAEFFER: In all due respect, I think we've got a chicken-and-egg argument here, but I think it's the violation of the state law based on the nonapplication or proper application of the federal law.

THE COURT: Well, let's assume for purposes of our discussion that in violating the federal law, if that in fact is what happened here, there then was -- the result was an absence of an ability to vest valid title under state law, and that's essentially what you are saying, are you not?

MR. SCHAEFFER: Yes.

THE COURT: Now, wouldn't either this court or the state court, whoever ends up hearing this, still have to make a determination of what the Internal Revenue Code requires by virtue of the notice requirement provisions of the Internal Revenue Code?

MR. SCHAEFFER: I think it does, but it has to make that determination, I submit, Your Honor, in applying the federal law to that particular issue, and the cases many of the cases cited have indicated that the state law has been upheld in having that ability to do so.

THE COURT: I don't think there is any doubt that, absent a removal petition, that the state courts could make

this determination. Lots of things are matters of concurrent jurisdiction between the state and the federal court system, and the state courts are deemed to be equally competent in almost all areas to make determinations under federal law, so I don't think we have to spend a lot of time arguing about that.

The question really becomes who gets to determine the forum? Does the plaintiff get to determine the forum by filing in state court or does the defendant -- well, let me say it another way. It would appear, if this case does turn on a construction of federal law, that arguably the plaintiff, when in this case the corporation is the master of their own complaint, could make the decision as to whether they wanted to go to federal court or they wanted to go to state court. Here the decision was to go to state court.

The question then becomes whether the defendant also has the ability to choose the forum in this case by addressing the question of whether on the face of the complaint there is an allegation of a violation of federal law or whether on the face of the complaint, in order to resolve the state law question, there has to be a determination of the construction of federal law, because if that's true, even though the state law -- even though the state court would presumably be equally competent to interpret the Internal Revenue Code, that doesn't end the inquiry because the defendant still has the ability to remove to federal court and invoke what essentially becomes our federal question jurisdiction if they would rather be in federal court. So we still have to determine whether, in essence, there is a vindication of an important federal interest that's pled in this case even though you are pleading a state law claim of action, and that's what it seems to me we are trying to sort out here.

MR. SCHAEFFER: In response to that analysis, Your Honor, I think that the proper jurisdiction is the state court because that is where the plaintiff has his remedy as to quiet title. He does not have a remedy in federal court as to quiet title of this piece of property. Even though the quiet title action may be determined on whether or not there was proper title and application of the notice provision of the IRS code, the cause of action is nonexistent in the federal court for the plaintiff to get the relief that he seeks, that being quieting title of ownership title of this particular piece of property. That's why I believe that the state court is the proper jurisdiction for this because the state court has the remedy available to the plaintiff by reviewing the federal statute to make that determination.

THE COURT: Well, if the defendant is correct that there is federal question jurisdiction here even though you are pleading a state law cause of action, because this involves construction of a federal statute and vindication of an essential or an important federal interest, and that's essentially what the defendant claims here, it seems to me -- and Mr. Walton will get a chance to address this in a minute -- it seems to me it would be then incongruous for the defendant to then say that the federal court wouldn't have the jurisdiction to grant the remedy that you are seeking if in construing the federal statute it was construed in favor of the plaintiff in this case. At a minimum would I not have supplemental jurisdiction in order to give that remedy?

MR. SCHAEFFER: I don't think so, Your Honor.

THE COURT: Supplemental jurisdiction by definition accompanies federal question jurisdiction. It doesn't accompany diversity jurisdiction.

MR. SCHAEFFER: I don't think this is a federal question case that would make it a federal court case. I think

it's a state cause of action with the application of federal law, but I don't think it is a state -- a federal question case, and I'm not sure that the supplemental jurisdiction is such that would be appropriate for the federal court to be determining a quiet title action in relation to the state property.

THE COURT: Well, that's an interesting question. I hadn't looked at it in exactly that way. There are a number of cases, as I said before, that the defendant cites where it appears as if federal courts just assumed that, because there was a construction of the Internal Revenue Code involved, that the federal court had original subject matter jurisdiction. Did you look at those cases to see if there was a remedy that was then given in the form of a quiet title award?

MR. SCHAEFFER: I did not determine if there was, Your Honor. If I recall, some of the cases cited by defendant were not third party cases but involved the -- a government as a party, whereas in this particular case as it sets now there is not a governmental party to this action.

THE COURT: I agree with you that we should disregard those cases where the United States was a party because clearly, if you had sued Darue and the United States government acting through the Internal Revenue Service, there is original federal question jurisdiction by virtue of the statute that vests this court with jurisdiction over all suits against the United States, assuming that you can get by any kind of immunity defenses.

I'm also not persuaded even a little bit by the allegation that at some point the United States might be brought in as a third party. I agree with you, they're not here, so we can ignore them as far as I'm concerned.

Are there any of the other cases that are cited by the defendant where the IRS was not a party where the court just assumed that this was properly in federal court?

MR. SCHAEFFER: None that I am able to point out to the court right at the moment, Your Honor.

THE COURT: All right. Well, it's an interesting question. Any other argument that you want to make, Mr. Schaeffer?

MR. SCHAEFFER: Your Honor, I believe that I have beaten to death in my pleadings my positions on this and I think they're well founded in case law, and I will stand on those arguments, Your Honor.

THE COURT: All right. Thank you.

Mr. Walton, let's take perhaps the simplest of these. What's your position on Mr. Schaeffer's contention that this court would not have the power to grant the relief that he's seeking if this court retained jurisdiction?

MR. WALTON: Your Honor, this court does have that jurisdiction, as you have pointed out.

THE COURT: You are conceding that.

MR. WALTON: I am, Your Honor.

THE COURT: And you would not argue, if I denied the motion to remand, that I couldn't grant the relief sought in the complaint.

MR. WALTON: I will not make that argument.

THE COURT: What is your legal analysis as to where I derive the authority to grant the relief?

MR. WALTON: I believe it is under, as I've pointed out in my brief, Your Honor, the 28 USC 1331 and 28 USC 1441 as a cause which arises under the Constitution, treaties, or laws of the United States, and Your Honor has already pointed out, I think, an excellent understanding of that area. There are a couple of arguments which I have which I would add to what the court has already indicated, that this case has at its origin a contention that there is a violation of either section 6335 and/or section 6339 because the Internal Revenue Code failed to meet the necessary notice requirements in order to vest title in the current record titleholder of the real estate.

THE COURT: How did the IRS get title here?

MR. WALTON: It was, to my understanding, Your Honor, a foreclosure for failure to pay taxes.

THE COURT: And then the IRS turned around and sold it to your client?

MR. WALTON: That is accurate, Your Honor. I believe that there are several points that I would make, if I might proceed, Your Honor, or do you have questions?

THE COURT: You may.

MR. WALTON: Thank you.

As you have pointed out, paragraphs 10 and 11 of the complaint raise the federal issues which we have just spoken about. I believe that this case arises under the law of the United States because the plaintiff's claim is going to be sustained if the law of the United States is given one construction and it's going to fail if it's given another construction. I think that the state law is not, under any stretch of the imagination, the basis for this claim.

Perhaps, as Mr. Schaeffer pointed out, he indicated he felt there was a chicken-and-an-egg-type argument here. The way I characterized it in my analysis is that what the state law does is it provides the vehicle for asserting the claim, a quiet title action. However, the basis for the claim arises in whether or not the Internal Revenue Service complied with the federal statutes, and in that respect the only conclusion which can be reached is whether this -- is that this has arisen under the laws of the United States. The dispositive issue in this case is not founded in state law. It is founded in the United States Code. The substantive law here which creates the cause of action is the federal law.

Under all of these analyses, Your Honor, I believe that the only conclusion that can be reached is that this arises under the laws of the United States, and, therefore, this court has subject matter jurisdiction, and I have conceded the other jurisdiction, although I believe, as Your Honor points out, ancillary jurisdiction would grant that to the court as well.

THE COURT: All right. Thank you.

MR. WALTON: Thank you, Your Honor.

THE COURT: Mr. Schaeffer, anything further?

MR. SCHAEFFER: The only point I'd like to bring out is the Moody case cited I think addressed the concerns and the issues that we have before the court pretty close factually and legally and found --

THE COURT: On which page is that discussed? Page 2?

MR. SCHAEFFER: 2, yes, Your Honor, and I had provided a copy of that. It's a Fourth Circuit case --

THE COURT: This is an unpublished Fourth Circuit case?

MR. SCHAEFFER: Yes, that's correct. And I believe that the facts were very similar to what we have here, and they determined it was a state cause of action and that the federal court was not in the business, if you will, of quieting title to state land.

THE COURT: All right. Thank you.

This case raises an interesting jurisdictional question. The plaintiff has moved the court to remand this action to the Eaton County Circuit Court, contending that its complaint asserts a simple quiet title action under state law. The defendant, Darue Engineering & Manufacturing, which removed this action to this court based on federal question jurisdiction and which bears the burden of establishing subject matter jurisdiction, contends that this action does indeed "arise under" federal law.

Now, there is great question in this court's mind whether the federal law creates this cause of action, as Mr. Walton appears at least in part to argue, or rather whether vindication of what the plaintiff contends is a state law right necessarily turns on some construction of federal law, as Mr. Walton alternatively argues. Either would be sufficient to establish federal question jurisdiction in this court under Franchise Tax Board versus Construction Laborers Vacation Trust, 463 U. S. 1 at 9 (1983).

While resolution of this question does depend, as the plaintiff argues here, on the well-pled complaint rule, removal based on federal question jurisdiction is proper only if the federal question appears on the face of the complaint. Warner versus Ford Motor Company, 46 F. 3d 531 at 533 (6th Cir. 1995).

Turning, then, to the plaintiff's complaint, the court has reviewed in detail paragraphs 10 and 11 of the plaintiff's complaint. The plaintiff alleges the basis for its claim that the defendant's deed is void and therefore represents an illegitimate cloud on the plaintiff's title to the subject property expressly and exclusively on the contention that the Internal Revenue Service failed to strictly comply with the notice requirements of 26 USC section 6335(a) before selling the subject property to Defendant Darue at a tax sale. Construing these essential provisions of the plaintiff's complaint, it does appear that in order for the plaintiff to prevail, that the plaintiff will have to establish a proposition of federal law as an essential element of its claim. To this extent, therefore, a federal question does appear to be presented on the face of the complaint.

This conclusion appears to be confirmed by the relatively recent decision of the Sixth Circuit in Long versus Bando Manufacturing of America, 201 F. 3d 754 (6th Cir. 2000). This case interpreted the decision of the United States Supreme Court in Merrell Dow, 478 U. S. at 805, wherein the Supreme Court clearly left open the possibility of federal jurisdiction even in the absence of an express or implied federal cause of action. The Sixth Circuit held that a federal court has jurisdiction "... if a substantial federal question of great federal interest is raised by a complaint framed in terms of state law, and if resolution of that federal question is necessary to the resolution of the state-law claim." The Sixth Circuit noted with favor the case of City of Chicago versus International College of Surgeons, 522 U. S. 156, affirming that a case may "arise under" the laws of the United States if it requires resolution of a substantial question of federal law even if state law creates the plaintiff's cause of action.

In this case a legitimate argument can presumably be made as to whether the question of federal law raised in this complaint, i.e., the application of 26 USC section 6335(a), is

in fact a "substantial question" of federal law. In this court's considered opinion, the answer to that question has to be in the affirmative. In no other way would purchasers of property from the federal government that was acquired in tax sales have the ability to rely upon the title they received from the Internal Revenue Service if the law required that, every time a dispute between the federal government and a taxpayer arose, the purchaser at tax sale had to defend that title in state court over claims that the Internal Revenue Service had failed to follow federal law, particularly where in most, if not all, such actions there is no reason for the taxpayer to have even been aware at the time of the purchase at the tax sale of compliance or lack of compliance by the Internal Revenue Code of federal law.

Accordingly, this court concludes that the plaintiff's claim does pose a "significant question of federal law."

Pursuing the analysis of the Sixth Circuit in Long versus Bando Manufacturing of America, supra, further, the court finds that the complaint does not set forth alternative theories of relief that might otherwise justify this case remaining in state court.

The court is not unmindful of the unpublished opinion of the Fourth Circuit relied upon by the plaintiff, Smith v. Moody, 1993 U. S. App. LEXIS 29984 (4th Cir. Nov. 19, 1993). However, this is an unpublished per curiam opinion that is not binding on this court, and because it includes no analysis of the Long considerations, the court finds that it has little or no persuasive value to this court.

The court in no way means to suggest in this opinion from the bench that a state court is not competent to adjudicate a claim of this type, notwithstanding the existence of the federal law question. The precise question here, however, is whether the defendant, Darue, is nevertheless

entitled to remove this action to federal court. This court finds that the defendant is so entitled, and, accordingly, the motion to remand is denied.

That decision, of course, makes the request of the plaintiff for fees and costs moot. The defendant in its reply seems to only be responding to the plaintiff's request for fees and costs. If I'm reading that incorrectly to the extent that the defendant is making a claim for fees and costs, it is denied as well in light of the unsettled law on this question and the relatively close question presented by this matter.

Anything further to come before the court, Mr. Schaeffer?

MR. SCHAEFFER: Nothing further, Your Honor.

THE COURT: Mr. Walton?

MR. WALTON: Yes, Your Honor. Might I approach the podium?

THE COURT: You may.

MR. WALTON: As Your Honor may recall from the brief which we submitted, at the time that this matter was initiated, a timely motion for summary disposition was filed in the state court action. A default was entered under circumstances detailed in our brief despite the fact that that motion had been timely filed. The basis of the motion was the failure of plaintiff to have the requisite certificate under state law as a corporation, that it had expired. The plaintiff has since then provided me with a copy indicating their certification under state law has been reinstated.

I would suggest that it might be best procedurally if I withdrew that motion, which I am willing to do if the

plaintiff is willing to provide me with a window of time to file a response, and I would suggest I can do that within 14 days.

THE COURT: I'm just looking at the work file that I brought with me to the bench, and I'm trying to recall whether there has even been a Rule 16 conference in this case, because I don't find a case management order in the file.

MR. WALTON: There has not, Your Honor.

THE COURT: Would that not be more logically taken up at the Rule 16 conference or worked out between you and Mr. Schaeffer?

MR. WALTON: I am perfectly willing to approach it that way. It is, Your Honor, a procedural obstacle to my filing a response to the complaint at this point. I'm simply seeking to move it aside so that I can file the answer. I'll try and work it out.

THE COURT: Mr. Schaeffer, do you have any objection to what apparently is an order having been entered by the state court being set aside in this case?

MR. SCHAEFFER: No, Your Honor, but I don't think it's appropriate to bring it up at this time. A phone call from opposing counsel would probably resolve most of these procedural matters.

THE COURT: Well, I do think it's important, to move this along, to get the answer filed and let's get the Rule 16 scheduled. For whatever reason, Mr. Walton thinks he can't even do that.

MR. SCHAEFFER: This is the first I've heard of this, and if that's an obstacle, a phone call is going to remedy whatever problem he perceives.

THE COURT: All right. With that assurance from Mr. Schaeffer, who has appeared here many times and whose word has been good, as far as I'm concerned, we'll schedule this for a Rule 16 and we'll take that up and whatever other scheduling issues need to be addressed at that time.

(Proceedings concluded at 2:10 P.M.)

REPORTER'S CERTIFICATE

I, Sharon E. Fox, Official Court Reporter for the United States District Court for the Western District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that on the date hereinbefore set forth I reported stenographically the proceedings had in the within-entitled and numbered cause; and I do further certify that the proceedings were transcribed by me with the use of computer-aided transcription under my direction and supervision and that the foregoing is a full, true, and accurate transcript of my original stenotype notes.

s/ Sharon E. Fox
Sharon E. Fox (CSR-3342)
U. S. District Court Reporter
315 West Allegan Avenue
Lansing, MI 48933

APPENDIX 2

COMPLAINT TO QUIET TITLE, FILED IN THE CIRCUIT COURT FOR THE COUNTY OF EATON, STATE OF MICHIGAN, DATED AND FILED: DECEMBER 14, 2000

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE
COUNTY OF EATON

GRABLE & SONS METAL PRODUCTS, INC.,
a Michigan Corporation,

Plaintiff, Case No. 2000-1560-CH

v

DARUE ENG & MFG, INC.,
a Michigan Corporation,

Defendant

J. Thomas Schaeffer P19950
Attorney for Plaintiff
206 S. Kalamazoo
Marshall, MI 49068
(616) 781-5193

Darue Eng & Mfg, Inc.
224 W. Main St.
Eaton Rapids, MI 48827

COMPLAINT TO QUIET TITLE

Now comes Leslie A. Grable, President of Grable & Sons Metal Products, Inc., and for complaint against Defendant says:

1. Plaintiff is a Michigan corporation located at P.O. Box 299, Dimondale, Michigan 48821.

2. Defendant is a Michigan corporation located at 224 North Main St., P.O. Box 239, Eaton Rapids, MI 48827.

3. This matter involves an amount in excess of $25,000 and further jurisdiction is awarded in relation to a quiet title action to real estate.

4. Plaintiff is the owner in fee of certain property located at 607-701 – West Plains Road, Eaton Rapids, MI 48827, the legal description of which reads as follows:

City of Eaton Rapids, Eaton County, Michigan
That part of the N fractional 1/2 of the NE fractional 1/4 of Section 4, T1N, R3W, City of Eaton Rapids, Eaton County, Michigan; Commencing on the N line of the right of way of the Michigan Central Railroad Company, at a point 15 rods E of the N & S 1/4 line of said Section 4, thence E'ly along said right of way line, to the W'ly line of the N.Y. Central R.R. Co.; thence N'ly along said right of way line to a point 25 rods S of the N line of said Section 4; thence W to a point 18 rods E of the N & S 1/4 line of said Section 4; thence S'ly to the place of beginning; Except two parcels described as:
(1) That part of the N fractional 1/2 of the N.E. fractional 1/4 of Section 4, T1N, R3W, beginning at the intersection of the N'ly property line of the Michigan Central R.R. Co.; with the W'ly property line of the N.Y. Central R.R. Co.; thence N'ly along said W'ly property line 156.7'; thence SW'ly at an angle of 35"33' with the last described line 327.87' to a

point on said N'ly property line; thence E'ly along said N'ly property line 220.12' to the point of beginning;
(2) That part of the N fractional 1/2 of the NE fractional 1/4 of Section 4, T1N, R3W, City of Eaton Rapids, Eaton County, Michigan, beginning on the W'ly line of the N.Y. Central R.R. N 27" E 156.7 ft. from the intersection of the W'ly line of said N.Y. Central R.R. N 27 degrees E 156.7 ft. from the intersection of the W'ly line of said N.Y. Central R.R. and the N'ly line of the Michigan Central RR; thence N 27 degrees E along the W'ly line of the N.Y. Central R.R. – 177.4 ft.; thence N 86 degrees W – 179 ft.; thence S 4 degrees West – 229.6 ft. to a triangular parcel owned by the Railroad Company; thence N 62 degrees 35' E along the N'ly property line of said triangular parcel – 127.4 ft. to the beginning. Also the right of ingress and egress over the 66 ft adjacent to this premises on the north; (end of description).
Commonly known as: 601-701 W. Plains Rd; Eaton Rapids, Michigan 48827.

5. Plaintiff received his interest in the property from David T. Phillips, a single man, pursuant to a warranty deed, a copy of which is attached hereto as Exhibit 1.

6. That there is a cloud on title to said property based on a deed to Defendant Darue Eng & Mfg, Inc. attached as Exhibit 2.

7. That pursuant to Form 2436 from the Department of Treasury the alleged sale was on December 16, 1994 a copy of which is attached as Exhibit 3.

8. That on December 16, 1994, the hereinafter-stated Defendant converted property owned by Plaintiff and has refused to return said property even though demands have been for such return.

9. By Defendant's conduct it has continued to claim an interest in the property, and upon information and belief, has made statements that it still considers the property belongs to it.

10. That the claim of the Defendant is invalid because the interest from which it claims, to-wit the Deed, attached as Exhibit 2, was given with improper notice pursuant to 26 USC 6331, et. seq.

That Plaintiff was not served pursuant to said requirement in that it was not given to it or was not left at the usual place of abode or business that existed within the Internal Revenue District where the seizure was made.

11. That since the tax deed was given pursuant to improper notice as required by 26 USC 6335(a), said transfer and claim through the tax deed is null and void and void ab initio.

12. Defendant's claim to said real estate has placed a cloud on said title and that by the non-validity of the tax deed Defendant retains no legal or beneficial interest in this property.

WHEREFORE, Plaintiff prays that:

(A) Defendant be ordered to have no right, title or interest whatever in or to the above described premises or any part thereof and that Defendant be enjoined from interfering with the use of the property by Plaintiff, its heirs, and assigns.

(B) Plaintiff have such other and further relief as may be ordered by this Court.

(C) Plaintiff be awarded reasonable costs and attorney fees.

Dated: December 14, 2000

GRABLE & SONS METAL PRODUCTS, INC.
Plaintiff

By: s/ Leslie A. Grable
Leslie A. Grable, its President

Prepared By:

s/ J. Thomas Schaeffer
J. Thomas Schaeffer
Attorney for Plaintiff